# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 711

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

WILSON & COMPANY, SWIFT & COMPANY, AND ARMOUR & COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed by the Solicitor General, on behalf of the United States, in the light of developments which have taken place since December 27, 1963, when the United States and the Federal Communications Commission filed a joint petition in this cause. As we explain below, the Solicitor General no longer believes that the case, in its present posture, warrants intervention by this Court. The Commission, which is a separate party and is authorized to seek review in its own right in this type of proceeding (see 47 U.S.C. 402(a); 5 U.S.C. 1031–1042), remains of the opinion, however, that the Court should grant review at this interlocutory stage. Accordingly, the petition has not been withdrawn.

When the court below stayed the effectiveness of the Commission's reduction in the rates for private-line telephone service, it failed to enter what the government regards as appropriate conditions. As argued in the petition, the court of appeals should have (1) made it explicit that there will be an obligation to make refunds at the conclusion of the review proceeding if the Commission's order is sustained, and (2) avoided the danger of irreparable injury to the customers by requiring AT & T to maintain records permitting a prompt computation of the refund obligations. The latter consideration gave urgency to the petition. As we stated in the concluding paragraph of the petition, "So long as the injunction contains no record-keeping requirements, there is a likelihood that refunds will not be feasible even if the court of appeals should ultimately order them."

Because of this same consideration, the government, contemporaneously with the filing of the petition, applied to Mr. Justice Clark, as Circuit Justice, for a writ of injunction "requiring AT & T to maintain records which will enable it to render a prompt accounting to its telephone customers should such an accounting ultimately be ordered by the court of appeals * * *." In response to this application, AT & T (together with its associated companies) gave assurance that it was in fact keeping such records and committed itself to do so during the pendency of the review proceedings. Since this commitment met all of the government's demands in relation to record keeping, the application to Mr. Justice Clark was

thereupon withdrawn. See brief in opposition filed by respondent AT & T, p. 16.

The only subsisting question, therefore, is whether this Court should now consider the failure of the court of appeals to include in its injunction *pendente lite* a declaration or condition that AT & T will be obliged to make restitution at the conclusion of the proceeding if the Commission's rate order is sustained.

We adhere to our conviction that the omission was a plain error of law; but we cannot represent, as the case now stands, that the omission creates a need—much less the imperious necessity traditionally deemed requisite—for interlocutory review by this Court. If the Commission's order concerning the telephone rates is reversed on the merits, there may be no right to restitution. If the court of appeals sustains the Commission's direction that the telephone rates be reduced, then restitution of the excess charges collected during the period that the injunction was in effect should be ordered. That relief is well within the power of the court of appeals. "It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis S. W. R.R. Co.*, 249 U.S. 134, 145–146. Presumably the court of appeals will grant the required relief. If it affirms the order but fails to direct restitution, both the Commission and the United States will still be in a position to seek effective relief from this Court. There is no question of the financial ability of AT & T to respond to any order of restitution.

The only conceivable difference between this case and *Arkadelphia, supra,* is that AT & T might ultimately argue against restitution on the grounds (1) that in the instant case increased rates as well as decreased rates were stayed; (2) that it will experience difficulty, especially in view of the passage of time, in collecting undercharges; and (3) that the appropriate disposition, if the court of appeals upholds the Commission's rate order, is to leave the parties where it finds them so far as liabilities for the past period are concerned. We believe, however, that this is plainly unsound. AT & T filed no petition to review the lowered telephone rates, and it will hardly be in a position to defend the just claims of its telephone customers on the ground that certain of its telegraph customers instituted litigation attacking telegraph rates. In all events, as AT & T recognizes (Br. in Opp., p. 13), all issues now open will remain open when the court of appeals passes upon the merits of the Commission's rate order.

The short of the matter, therefore, is that although a proper order would have avoided doubt, no one has actually been prejudiced by the court of appeals' failure to declare the conditional liability of AT & T. Nor is certiorari likely to expedite the final outcome, for we are advised that the court of appeals will hear argument on the merits of the Commission's order by early Spring.

Accordingly, the Solicitor General is of the view that the case, in its present posture, makes no proper

demand upon this Court's time, and he withdraws his support of the petition.

Respectfully submitted.

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*Solicitor General.*

RALPH S. SPRITZER,
*Assistant to the Solicitor General.*

FEBRUARY 1964.

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